No. 94-12

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ROSS MIDDLEMIST, WAYNE W. MAUGHAN, FLATHEAD JOINT BOARD OF CONTROL,

Petitioners,

v.

SECRETARY OF THE UNITED STATES DEPARTMENT OF INTERIOR, BRUCE BABBITT; DIRECTOR OF THE BUREAU OF INDIAN AFFAIRS, PORTLAND AREA, STANLEY M. SPEAKS; SUPERINTENDENT OF THE BIA FLATHEAD AGENCY, ERNEST MORAN, IN THEIR OFFICIAL CAPACITIES; MEMBERS OF THE TRIBAL COUNCIL OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, MICHAEL PABLO, SONNY MORIGEAU, LOUIS ADAMS, HANK BAYLOR, FRED MATT, TONY INCASHOLA, JOHN LOZEAU, LLOYD IRVINE, PATRICK LEFTHAND, LAURENCE KENMILLE; DIRECTOR OF THE DEPARTMENT OF NATURAL RESOURCES OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, RHONDA R. SWANEY; ADMINISTRATOR OF THE SHORELINE PROTECTION OFFICE OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, J. LLOYD JACKSON; MEMBERS OF THE SHORELINE PROTECTION BOARD OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, JOSEPH SCHNEIDER, GEM MERCER, AL HEWANKORN, DONALD LUCAS, THURMAN TROSPER, HENRY NORMANDEAU,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. THE ARGUMENTS OF PETITIONERS AND THE RESPONDENTS DEMONSTRATE THIS CASE PRESENTS IMPORTANT ISSUES WHICH SHOULD BE REVIEWED BY THE COURT	2
II. THE FEDERAL RESPONDENTS CONCEDE THE COURT HAS NOT ADDRESSED THE CENTRAL FACTOR IN PETITIONERS' AND AMICI'S ARGUMENT—THAT ABSENT ON-GOING TRIBAL PROCEEDINGS *NATIONAL FARMERS* NEITHER REQUIRES NOR ALLOWS A COURT TO AVOID DECIDING A FEDERAL QUESTION PROPERLY BEFORE IT	3
III. RESPONDENTS ALSO ESSENTIALLY AGREE THE ISSUE HERE IS PURELY A FEDERAL QUESTION, AND IF THE TRIBES HAVE THE AUTHORITY THEY ASSERT IT MUST REST ON THE SECOND *MONTANA* EXCEPTION	4
IV. THE CONFLICT BETWEEN THE COURT'S DECISIONS IN *NATIONAL FARMERS* AND *IOWA MUTUAL* AND THE DOCTRINE AS AMPLIFIED BY THE NINTH CIRCUIT AND AS APPLIED IN THIS CASE CANNOT BE RESOLVED EXCEPT THROUGH REVIEW BY THIS COURT	6
CONCLUSION	10

TABLE OF AUTHORITIES

CASES — Page

Conley v. Gibson, 355 U.S. 41 (1957) 5
Duncan Energy v. Three Affiliated Tribes, 812 F. Supp. 1008 (D.C.N.D. 1993) 2
Duncan Energy v. Three Affiliated Tribes, 27 F.3d 1294 (8th Cir. 1994) 2, 6
Duncan Energy v. Three Affiliated Tribes, No. 94-689 2
Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987) ..... *passim*
Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 324 (1982) 8
Montana v. United States, 450 U.S. 544 (1981) 5
Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938) 7
National Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845 (1985) ..... *passim*
Pittsburgh & Midway Coal Mining Co. v. Derrick Watchman, No. 94-2060, Tenth Circuit Court of Appeals 9, 10
Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) 8
Steffel v. Thompson, 415 U.S. 452 (1974) 5, 6, 8
Ticor Title Insurance Co. v. FTC, 814 F.2d 731 7
United States v. Plainbull, 957 F.2d 724 (9th Cir. 1992) 9
Younger v. Harris, 401 U.S. 37 (1971) 6, 7, 8

STATUTES

28 U.S.C. § 1343(3) 7
42 U.S.C. § 1983 ..... 7, 8

OTHER AUTHORITIES

U.S. Department of Commerce, Bureau of the Census, News Release July 11, 1991, Table 1 3
World Almanac & Book of Facts (1991) 2
Wright, Law of Federal Courts (1976) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-42

ROSS MIDDLEMIST, WAYNE W. MAUGHAN, FLATHEAD JOINT BOARD OF CONTROL,

Petitioners,

v.

SECRETARY OF THE UNITED STATES DEPARTMENT OF INTERIOR, BRUCE BABBITT; DIRECTOR OF THE BUREAU OF INDIAN AFFAIRS, PORTLAND AREA, STANLEY M. SPEAKS; SUPERINTENDENT OF THE BIA FLATHEAD AGENCY, ERNEST MORAN, IN THEIR OFFICIAL CAPACITIES; MEMBERS OF THE TRIBAL COUNCIL OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, MICHAEL PABLO, SONNY MORIGEAU, LOUIS ADAMS, HANK BAYLOR, FRED MATT, TONY INCASHOLA, JOHN LOZEAU, LLOYD IRVINE, PATRICK LEFTHAND, LAURENCE KENMILLE; DIRECTOR OF THE DEPARTMENT OF NATURAL RESOURCES OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, RHONDA R. SWANEY; ADMINISTRATOR OF THE SHORELINE PROTECTION OFFICE OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, J. LLOYD JACKSON; MEMBERS OF THE SHORELINE PROTECTION BOARD OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, JOSEPH SCHNEIDER, GEM MERCER, AL HEWANKORN, DONALD LUCAS, THURMAN TROSPER, HENRY NORMANDEAU,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONERS

I. THE ARGUMENTS OF PETITIONERS AND THE RESPONDENTS DEMONSTRATE THIS CASE PRESENTS IMPORTANT ISSUES WHICH SHOULD BE REVIEWED BY THE COURT.

Concluding a summary of their argument that in the absence of ongoing tribal proceedings the Court's decisions in *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985) and *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), neither require nor allow deferral, eleven states supporting the issuance of a writ of certiorari to the Ninth Circuit Court of Appeals in this case correctly stated: "The Petition thus presents an important question over the scope of the *National Farmers* exhaustion doctrine—a question which should be decided now." Amici Brf. at 4. (*See also* the vacillating arguments of the government illustrating the need for review here. *Infra* at 8-10.) Neither the Tribal nor the Federal Respondents dispute the importance of the issues raised here. Nor could they.[1] The interests involved range from state sovereign interests in preserving basic principles of federalism to the individual Petitioners' interest in seeing their federal questions decided by a federal court. This range of interests includes the interests of counties in preserving their ability to make plans and budgets to fulfill their duties, and the interests of local governments such as the Flathead Joint Board of Control in preserving their ability to execute their duties and provide services to constituents.

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[1] In a case raising almost identical legal issues, plaintiffs challenging the assertion of tribal civil regulatory authority over their operations on nonmember-owned fee land in an "open" area, owned predominantly by nonmembers, of the Fort Berthold Reservation in North Dakota filed a Petition for Writ of Certiorari to' the Eighth Circuit Court of Appeals on October 17, 1994. *Duncan Energy, et al. v. Three Affiliated Tribes, et al.*, No. 94-689, seeking review of *Duncan Energy v. Three Affiliated Tribes*, 27 F.3d 1294 (8th Cir. 1994), *rev'g Duncan Energy v. Three Affiliated Tribes*, 812 F.Supp. 1008 (D.C.N.D.).

[2] World Almanac & Book of Facts (1991) at 394.

Since there are 280 Indian reservations within the territorial confines of the United States,[2] and each tribe claims separate, pre-constitutional sovereignty, and since more than 700,000 nonmembers live within the boundaries of those reservations,[3] the issue is not only important in terms of the constitutional implications [4] and the power of Congress over Indian affairs, but also in terms of the number of people affected, the security of their persons and investment in their property, and the proper functioning of the federal judiciary in deciding federal questions affecting the relationship between tribes and nonmembers.

Respondents sensibly do not deny the doctrine fashioned by the Ninth Circuit concerning "reservation affairs," which even in the absence of ongoing proceedings requires a federal district court to abjure its "virtually unflagging duty" to adjudicate federal questions, raises important and troubling issues, since this broad exception would engulf the rule. Thus, whether the Ninth Circuit's decision and rationale (which the Tribal Respondents reiterate), the Federal Respondents' proffered justification, or Petitioners' position is correct, this Court should decide the matter directly.

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[3] U.S. Department of Commerce, Bureau of the Census, News Release July 11, 1991, Table 1.

[4] Respondents maintain the Tribes are unconstrained by constitutional niceties in dealing with nonmembers and seem to delight in asserting this as a defense to Petitioners' claims. Thus, the Tribes have argued here Petitioners constitutional claims are "frivolous" (Brief in Support of Motion to Dismiss at 16) and that they should "accept the fact of life" that they do not enjoy the protections of the Bill of Rights when regulated by tribal government. For that very reason, Petitioners argue, Congress would not have intended tribal governments to exercise authority over nonmember activity on fee land in this instance.

II. THE FEDERAL RESPONDENTS CONCEDE THE COURT HAS NOT ADDRESSED THE CENTRAL FACTOR IN PETITIONERS' AND AMICI'S ARGUMENT—THAT ABSENT ONGOING TRIBAL PROCEEDINGS *NATIONAL FARMERS* NEITHER REQUIRES NOR ALLOWS A COURT TO AVOID DECIDING A FEDERAL QUESTION PROPERLY BEFORE IT.

The Federal Respondents concede the Court has not "directly address[ed]" whether a federal court can abstain from deciding a federal question and require exhaustion of tribal remedies in the absence of ongoing tribal proceedings. U.S. Opp. at 8. While Petitioners believe otherwise, since it appears the Court did address the matter (as evidenced by the facts, language, analysis, and citations in *National Farmers* and *Iowa Mutual*), in essence the parties agree additional guidance from the Court is needed concerning the place of ongoing proceedings in a federal court's exercise of its discretion to decide whether to abstain and require exhaustion of tribal remedies. Petitioners argue these decisions plainly rested on the fact of ongoing proceedings in tribal forums. The Tribal Respondents, at least implicitly, argue the Court decided the issue and held the presence or absence of ongoing proceedings irrelevant. The Federal Respondents deny the Court decided this issue, and now offer a rationale lacking any basis in the Court's decisions that ongoing proceedings should not be required. (But see *infra* at 8-10.) In any event, it is evident review by the Court and a direct decision on this issue is needed.

III. RESPONDENTS ALSO ESSENTIALLY AGREE THE ISSUE HERE IS PURELY A FEDERAL QUESTION, AND IF THE TRIBES HAVE THE AUTHORITY THEY ASSERT IT MUST REST ON THE SECOND *MONTANA* EXCEPTION.

Similarly, Respondents do not dispute that, in the ordinance at issue, the tribes claim to possess pre-constitutional, inherent sovereign authority to regulate any non-

member farming and ranching activities which occur on aguatic lands (Thus, the Tribes claim authority to regulate the 86% nonmember population on the reservation which owns roughly 50% of the land overall; 90% of the land in the Irrigation District.). It follows, then, that the issue is solely the federal question of the limits of their authority. There is no issue of tribal law here.[5] Given this, they must concede the sole possible basis for this exception authority is the so-called *Montana* exception. *Montana v. United States*, 450 U.S. 544, 566 (1981). As to this, Respondents assert they should be given the opportunity to show facts indicating the Tribes do have inherent sovereign powers under this exception.[6]

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[5] Neither the Tribes nor the Federal Defendants ever argued in this litigation that as a matter of tribal law the Tribes have not asserted the challenged authority or that they do not possess that authority. (Federal Respondents are simply wrong when they imply a question of tribal law could be at issue. U.S. Opp. at 8.) Thus, the issue is purely one of federal law, vitiating both the need and the justification for deferring to a (nonexistent) tribal adjudication. In this light, the principles underlying the *National Farmers* doctrine should not carry much weight, just as the principles of comity have little force when a federal court is asked to abstain in favor of state remedies which are not ongoing. *Steffel v. Thompson*, 415 U.S. 452, 462-463 (1974). The fact is, while Congress' policies of tribal self-determination and self-government remain, so does the overriding imperative of "Our Federalism." Yet this does not suffice, in the absence of ongoing proceedings, to allow abstention. Moreover, the other *National Farmers* principles—gaining the benefit of tribal court expertise and development of a full record—are irrelevant in this context. Tribal courts have no more expertise in federal law than federal courts, and federal courts are equally adept at allowing litigants to develop full records on federal issues.

[6] Tribal Respondents argued this matter is not ripe because there is "no federal judicial record" as "Petitioner's litigation strategy denied the Federal and Tribal forums of the opportunity to develop findings of facts and conclusions of law." Tr. Opp. at 5, 9-10. On the contrary, by filing a motion to dismiss, Respondents made the litigation choice to address legal issues based on the well-pleaded facts construed in favor of Petitioners. *Conley v. Gibson*, 355 U.S. 41 (1957). Thus, they cannot seriously dispute

They do not, however, offer any explanation of how farming and ranching activities could possibly, as a matter of law, provide an exception to Congress' intent to abrogate tribal government authority over nonmember activity in acts specifically designed to bring nonmember farmers and ranchers onto the reservation. What is more, they fail to explain why the Court should not reach this legal issue now when they chose to focus this litigation on the legal issues raised in the complaint.

IV. THE CONFLICT BETWEEN THE COURT'S DECISIONS IN *NATIONAL FARMERS* AND *IOWA MUTUAL* AND THE DOCTRINE AS AMPLIFIED BY THE NINTH CIRCUIT AND AS APPLIED IN THIS CASE CANNOT BE RESOLVED EXCEPT THROUGH REVIEW BY THIS COURT.

Petitioners and amici argue ongoing proceedings are required before applying the *National Farmers* doctrine because it rests on "comity," and the Court has forcefully stated that, in the absence of ongoing proceedings, the principles of "equity, comity, and federalism have little force." *Steffel v. Thompson,* 415 U.S. 452, 462-463 (1974). Thus, they argue the principles on which the *National Farmers* doctrine rests—comity, congressional policies favoring tribal self-government, and judicial efficiency (which roughly parallel the principles of *Younger v. Harris,* 401 U.S. 37 (1971))—also lack force in the absence of ongoing proceedings. In any event, if, as the Federal Respondents claim without explanation, they do carry sufficient force to relieve a federal court of its virtually unflagging duty to decide federal questions, the rationale for this extraordinary doctrine[7] and the cir-

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that the issues of whether the court was correct in refraining from exercising its jurisdiction and whether on this record, as a matter of federal law, the Tribes lack the authority they assert are fully joined here.

[7] See concurrence of Loken, J., in *Duncan Energy,* 27 F.3d at 1302-03. Deferral in absence of ongoing proceedings "looks like a subversion of the 'virtually unflagging obligation of the federal

cumstances under which it will and will not operate should be explained by this Court.

The Federal Respondents' argument that the *National Farmers* doctrine is akin to the doctrine requiring exhaustion of federal administrative remedies appears singularly inapt, having no textual basis in the pertinent decisions. To be sure, the Court employed the terms "exhaustion" and "deferral" in these cases. But substance should always prevail over form,[8] and Petitioners do not argue the doctrine is *identical* to *Younger* abstention. In addition, the decisions which the Federal Respondents cite in favor of their analysis help prove Petitioners' point. U.S. Opp. at 9, n.2. In each case, *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938), and *Ticor Title Insurance Co. v. FTC*, 814 F.2d 731 (D.C. Cir. 1987), the federal court plaintiff was already involved in ongoing federal administrative proceedings. The Federal Respondents' suggestion is also inapt because, contrary to their assertion, it would be anomalous to apply *National Farmers* in the absence of ongoing proceedings when such deferrence is neither given nor allowed in federal challenges to state laws in the absence of ongoing state proceedings. But whether the doctrine is one of abstention, deferral, or exhaustion, the divergent analyses proposed by the parties demonstrate this important issue is worthy and in need of review and resolution by this Court.

The implication (U.S. Opp. at 9) that this Court has limited *Younger* abstention to cases involving pending state proceedings so that a plaintiff could more

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courts to exercise the jurisdiction given them.'" (citation omitted.) *Id.*

[8] The "form" employed by the Court in terms of the cases and other authorities cited also points to *Younger* as the model. In fact, the exceptions to the doctrine, *National Farmers*, 471 U.S. at 856, n.21, *Iowa Mutual*, 40 U.S. at 19, n.12, are taken *in toto* from the *Younger* doctrine. It seems improbable that the Court would graft such exceptions onto a doctrine not closely allied in its important features to the doctrine from which they derive.

easily vindicate federal rights under 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) in federal court is misleading. First, in light of federal courts' solemn obligation to exercise the jurisdiction given them, the burden is to justify *abstention*, not the need to go forward. Moreover, *Younger* appropriately looks not to the type of federal right asserted but the factors of equity, comity, and federalism. A doctrine of sound judicial administration in light of "Our Federalism," it was not fashioned to provide more solicitous federal court concern for some federal causes of action than for others. The fact is many federal claims not arising from 42 U.S.C. § 1983 are heard in federal courts and exempted from *Younger* abstention simply because there are no ongoing proceedings.

The simplest explanation, however, may be the best retort to this suggestion. If, in fact, the Court has not required abstention for cases based on § 1983, then one would assume the Court would have said this. It has not. In fact, it has explicitly said that even § 1983 actions are subject to abstention if there are ongoing state proceedings.[9]

Not surprisingly, the Federal and Tribal amici and the Tribal Respondents in *National Farmers* made arguments

[9] The central reason discussed in *Steffel*, of course, for not requiring abstention was the lack of ongoing proceedings, not the importance of the rights at stake. Be that as it may, it is worth noting that contrary to the *Younger* context, where the price of abstention is sometimes justified because the states are obligated to protect federal rights and there is a statutory procedure for reviewing state decisions, tribal governments are not required to respect federal constitutional rights, tribal courts are not required to protect such rights, and there is no statutory avenue for review of their decisions affecting such rights. A writ of habeas corpus represents the only statutory avenue of review of a tribal government's actions. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). But this remedy rests on the assumption the tribal government acted within its sovereign authority, which is the central issue here. The remedy for an *ultra vires* acts of tribal government has neither been restricted nor provided by statute.

to the Court along the lines Petitioners advance here. The two principle arguments advanced by the Respondents and Amici were (a) that every court has jurisdiction to determine its jurisdiction, and (b) the *Younger* abstention doctrine provides the "most apt" analogy for fashioning a doctrine deferring to ongoing proceedings in tribal courts. Brief of Amici Curiae Assiniboine and Sioux Tribes, et al., at 21, citing Wright, Law of Federal Courts § 16 (1976) and analogizing to *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423 (1982); see also Brief of Respondents Crow Tribes and Officials in Opposition to Petition for Writ of Certiorari, at 6-9; and Brief on the merits at 14-17.

It is surprising, then, to find the government here arguing against the Petition in light of its earlier arguments to this Court. Moreover, in the Ninth and Tenth Circuits, the government has since argued the inapplicability of the doctrine in the absence of ongoing proceedings. Thus, characterizing the issue as one of "abstention," in *United States v. Plainbull*, 957 F.2d 724 (9th Cir. 1992), the Department of Justice argued to the Ninth Circuit in a petition for rehearing and rehearing en banc that "The Supreme Court in *National Farmers Union* and *Iowa Mutual* had no occasion to consider whether a district court must require exhaustion of tribal court remedies when a case presents issues of federal, not tribal law, and where there is no pending tribal court proceeding." (Brf. on Rehearing, at 12.) (Citations omitted.) In a footnote appended to this text, it argued, "the absence of any pending tribal court proceedings *is* relevant . . . See also *Colorado River, supra,* (presence of pending state proceeding deemed as critical factor in abstention analysis)." *Id.* (Emphasis in original.) That the government advanced such arguments in a request for rehearing en banc indicates they have some validity, contrary to the dismissive approach Respondents take in regard to them here.

Attorneys for the Department of Justice have also advanced similar arguments recently in the Tenth Circuit. In *Pittsburg & Midway Coal Mining Co. v. Derrick Watchman*, No. 94-2060, Tenth Circuit Court of Appeals, the United States argued in an amicus brief that in assessing the factors of comity under *National Farmers*, "it is our view that courts should be guided by a governing set of standards for *abstention* which parallel those principles applicable to questions of whether federal courts should interfere with state judicial and administrative proceedings." (U.S. Amicus Brf. at 7) (Emphasis supplied.) Moreover, the government framed the issue as concerning the pertinent factors for deciding "whether a federal court should interefere with an (sic) ongoing tribal administrative or judicial proceedings." *Id.* at 14. Thus, in this brief, submitted by the Acting Assistant Attorney General, Lois J. Schiffer, who appears in this case, the Government contradicted its position here.

More important than the shifting labels the Government has used to characterize this doctrine, however, is the fact that it has argued, as Petitioners do here, that ongoing tribal proceedings are an indispensable predicate to application of the *National Farmers* doctrine. It was correct then, as the Petitioners are now.

CONCLUSION

Therefore, Petitioners respectfully request that the Court issue a writ of certiorari to the Ninth Circuit Court of Appeals to review the decision in this matter.

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